

AUSTRALIA / JUDGMENT

Farley-Smith v Repatriation Commission [2012] FCA 80

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FEDERAL COURT OF AUSTRALIA

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Farley-Smith v Repatriation Commission [2012] FCA 80

Citation: Farley-Smith v Repatriation Commission [2012] FCA 80

Appeal from: Farley-Smith and Repatriation Commission [2010] AATA 637

Parties: GWENDA FARLEY-SMITH v REPATRIATION COMMISSION

File number: VID 826 of 2010

Judge: DODDS-STREETON J

Date of judgment: 13 February 2012

Catchwords: DEFENCE AND WAR – Claim for pension by widow of veteran with operational service – Administrative Appeals Tribunal affirmed decision of respondent that death of veteran not war-caused – Standard of proof – Whether tribunal misapplied relevant principles and authorities – Whether apprehended bias – Whether denial of procedural fairness

Legislation: Administrative Appeals Tribunal Act 1975 (Cth) ss 33, 39

Veterans' Entitlements Act 1986 (Cth) s 120(1) and (3)

Cases cited: British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283 distinguished

Bull v Repatriation Commission (2001) 188 ALR 756 cited

Bushell v Repatriation Commission (1992) 175 CLR 408 considered

Byrnes v Repatriation Commission (1993) 177 CLR 564 considered

Collins v Repatriation Commission (2009) 177 FCR 280 cited

East v Repatriation Commission (1987) 16 FCR 517 discussed

Leighton v Repatriation Commission [2000] AATA 144 considered

Leon Holdings Pty Ltd v O'Donnell (2009) 25 VR 569

Re Stacey (unreported, Veterans' Review Board, 26 June 1985) cited

Repatriation Commission v Bey (1997) 79 FCR 364 discussed

Repatriation Commission v Dunn (2006) 94 ALD 97 cited

Repatriation Commission v Law (1980) 31 ALR 140 cited

Repatriation Commission v Webb (1998) 51 ALD 575 discussed

The Ship "Gem of Safaga" v Euroceanica (UK) Ltd (2010) 265 ALR 88 cited

Whitworth v Repatriation Commission (2003) 78 ALD 126 discussed

Date of hearing: 17 November 2011

Date of last submissions: 17 November 2011

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 180

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Solicitor for the Respondent: Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION VID 826 of 2010

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: GWENDA FARLEY-SMITH

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: DODDS-STREETON J

DATE OF ORDER: 13 FEBRUARY 2012

WHERE MADE: MELBOURNE

THE COURT ORDERS
THAT:

1. The appeal be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

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ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: GWENDA FARLEY-SMITH

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: DODDS-STREETON J

DATE: 13 FEBRUARY 2012

PLACE: MELBOURNE

REASONS FOR JUDGMENT

iNTRODUCTION

1 The applicant appeals under s 44(1) of the Administrative Appeals Tribunal Act 1975 (Cth) ("the AAT Act") from the decision of the Administrative Appeals Tribunal ("the tribunal") given on 25 August 2010.

2 The tribunal affirmed a decision of the respondent ("the Commission") made under the Veterans' Entitlements Act 1986 (Cth) ("the Act") that the death of the applicant's husband, William David Farley-Smith ("the veteran"), was not war caused.

THE FACTS

3 The background facts, noted by the tribunal as follows (at [1] to [5]), were undisputed:

1. Mr William David Farley-Smith served in the Australian Army between 6 April 1942 and 8 August 1946. He had operational service as a gunner in Darwin between 1943 and 1945.
2. Mr Farley-Smith died on 14 November 2001. He was aged 78 years. His death certificate was certified by Dr Simon Thompson. The cause of death was stated as:

Myelofibrosis – 4 years

Oesophageal varices – 2 years

3. Mrs Gwenda Farley-Smith lodged a claim with the Repatriation Commission (the Commission) for a widows' pension on 11 February 2002. In her claim, she said she believed her husband's smoking of pipe tobacco caused or contributed to his death. She contended that her husband's myelofibrosis was secondary to chronic myeloid leukaemia, which was brought on by his exposure to benzene through smoking, vapour inhalation and dermal contact.
4. On 7 March 2002 the Commission rejected Mrs Farley-Smith's claim on the grounds that the cause of myelofibrosis (MF) was not known and it was therefore not possible to relate her husband's MF to his service. On 15 May 2002 Mrs Farley-Smith applied to the Veterans' Review Board (VRB) for a review of the Commission's decision. On 5 May 2003 the VRB affirmed the Commission's decision. Mrs Farley-Smith then lodged an application with the Tribunal on 23 June 2003 seeking a review of the VRB decision.
5. On 4 October 2005 the Tribunal set aside the Commission's decision and instead decided that Mr Farley-Smith's death was war-caused. The Commission lodged an appeal to the Federal Court of Australia on 2 November 2005. The Commission's appeal was successful and on 18 July 2007 the Federal Court (Middleton J) ordered that:
 1. The Appeal be allowed.
 2. The decision of the Tribunal be set aside and the matter be remitted to a differently constituted Tribunal for determination according to law.

4 The right of appeal under the AAT Act is limited to a question of law. The supplementary notice of appeal dated 1 November 2010 ("notice of appeal") set out a number of questions of law.

Grounds of appeal

5 The notice of appeal contained the following grounds of appeal:

4.1 The Tribunal erred in law in that it rejected evidence before it in determining whether or not the material pointed to a hypothesis being raised between the claimed condition and the circumstances of the service by the veteran, namely in substance the relationship between benzene exposure and the medical condition myelofibrosis, and in particular when it:

4.1.1 Rejected the evidence given by Dr Collins on the basis of an assessment of credibility;

4.1.2 Weighed up competing evidence before it;

4.1.3 Treated the evidence of Associate Professor Parkin with caution due to the role he had played in the formulation of the claim; and

4.1.4 Rejected evidence on the basis that an expert was not 'eminent' in the required field, given the qualification and experience of the relevant expert witness;

4.1.5 Rejected the receipt of evidence as to a matter of expert evidence in preference for the application of the Tribunal's own views on the same matter, which it deemed to be of equivalent status to expert evidence;

4.1.6 Failed to follow and or be appropriately guided by *Bushell v Repatriation Commission* (1992) 175 CLR 408, *Repatriation Commission V Byrne and Repatriation Commission v Leighton* [2001] FCA 246 and *East v Repatriation Commission* (1987) 16 FCR 517.

4.2 The Tribunal erred in law in that it determined that it could not assume a connection to service, in the circumstances, because it had made an assumption in relation to the existence or occurrence of a fact upholding the hypothesis.

4.3 The Tribunal Member who is a qualified medical practitioner should have decided it was property [sic] to disqualify herself from hearing the case on the basis that she was a qualified medical practitioner and had previously determined (in dissent) that the connection between the hypothesis posed in this case was too remote and tenuous.

4.3.1 The Tribunal Member had prejudged the case;

4.3.2 The Tribunal Member did not bring an open mind to the case before her;

4.3.3 The case before he [sic] Tribunal was substantially similar to the case she had earlier determined (both in the hypothesis claimed and the experts presented to it);

4.3.4 An independent observer made aware of these facts would have determined that the applicant could not succeed in her application before a Tribunal so constituted.

4.4 The Tribunal erred in law in that without any evidentiary basis for so concluding and/or holding it determined that it could not assume a connection to service, in the circumstances, because it had made an assumption in relation to the existence or occurrence of a fact upholding the hypothesis.

4.5 The Tribunal erred in law in that the Tribunal refused the Applicant a right of reply contrary to the Applicant's right on a proper construction of s 33 of the Administrative Appeals Tribunals Act 1975 to have the Tribunal afford procedural fairness to the Applicant and should have allowed her representative an opportunity to reply to the Respondent's submission.

4.6 The Tribunal erred in law on any application in failing to disqualify itself on the ground that the Applicant had failed to articulate every particular event or ruling that occurred in the course of the hearing which might cause an independent lay observer to perceive that the Tribunal may be ostensibly biased?

Orders sought

6 The applicant seeks the following orders:

3.1 That the Decision of the Administrative Appeals Tribunal be set aside;

3.3 That the Court find that the applicant's death was war caused;

3.4 Alternatively, that the matter be remitted to a differently constituted Tribunal to be determined according to law;

3.4 That the Respondent pay the Applicant's costs in the appeal.

Relevant Legislation

7 Section 13(1) of the Act provides:

13 Eligibility for pension

(1) Where:

(a) the death of a veteran was war-caused; or

(b) a veteran is incapacitated from a war-caused injury or a war-caused disease;

the Commonwealth is, subject to this Act, liable to pay:

(c) in the case of the death of the veteran—pensions by way of compensation to the dependants of the veteran; or

(d) in the case of the incapacity of the veteran—pension by way of compensation to the veteran;

in accordance with this Act.

8 Section 7(1) of the Act provides:

7 Eligible war service

(1) Subject to subsection (2), for the purposes of this Act:

(a) a person who has rendered operational service shall be taken to have been rendering eligible war service while the person was rendering operational service; and

- (b) a person who has rendered continuous full-time service (not being operational service) as a member of the Defence Force during World War 1 shall be taken to have been rendering eligible war service while the person was so rendering continuous full-time service; and
- (c) a person who has rendered continuous full-time service (not being operational service) as a member of the Defence Force during World War 2, being service that commenced before 1 July 1947, shall be taken to have been rendering eligible war service while the person was so rendering continuous full-time service; and
- (d) a person who rendered continuous full-time service (not being operational service) as a member of the Interim Forces during World War 2 on or after 1 July 1947 shall be taken to have been rendering eligible war service while the person was so rendering continuous full-time service; and
- (e) a person who was employed on a ship as an Australian mariner is taken to have been rendering eligible war service:
 - (i) if part of that employment was operational service—for the part of that employment that was not operational service; or
 - (ii) in any other case—while the person was so employed.

9 Section 120 of the Act relevantly provides:

120 Standard of proof

- (1) Where a claim under Part II for a pension in respect of the incapacity from injury or disease of a veteran, or of the death of a veteran, relates to the operational service rendered by the veteran, the Commission shall determine that the injury was a war-caused injury, that the disease was a war-caused disease or that the death of the veteran was war-caused, as the case may be, unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination.

...

- (3) In applying subsection (1) or (2) in respect of the incapacity of a person from injury or disease, or in respect of the death of a person, related to service rendered by the person, the Commission shall be satisfied, beyond reasonable doubt, that there is no sufficient ground for determining:
 - (a) that the injury was a war-caused injury or a defence-caused injury;
 - (b) that the disease was a war-caused disease or a defence-caused disease; or
 - (c) that the death was war-caused or defence-caused;

as the case may be, if the Commission, after consideration of the whole of the material before it, is of the opinion that the material before it does not raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person.

- (4) Except in making a determination to which subsection (1) or (2) applies, the Commission shall, in making any determination or decision in respect of a matter arising under this Act or the regulations, including the assessment or re-assessment of the rate of a pension granted under Part II or Part IV, decide the matter to its reasonable satisfaction.
- (5) Nothing in the provisions of this section, or in any other provision of this Act, shall entitle the Commission to presume that:
 - (a) an injury suffered by a person is a war-caused injury or a defence-caused injury;
 - (b) a disease contracted by a person is a war-caused disease or a defence-caused disease;
 - (c) the death of a person is war-caused or defence-caused; or
 - (d) a claimant or applicant is entitled to be granted a pension, allowance or other benefit under this Act.
- (6) Nothing in the provisions of this section, or in any other provision of this Act, shall be taken to impose on:
 - (a) a claimant or applicant for a pension or increased pension, or for an allowance or other benefit, under this Act; or
 - (b) the Commonwealth, the Department or any other person in relation to such a claim or application;

any onus of proving any matter that is, or might be, relevant to the determination of the claim or application.

Relevant authorities

10 As the applicant contends that the tribunal misapplied the principles of a number of significant authorities governing the proper approach to, and relationship between, s 120(1) and (3) of the Act, it is convenient to consider the principal decisions at the outset.

11 In *East v Repatriation Commission* (1987) 16 FCR 517 ("East"), the Full Court (Jenkinson, Neaves and Wilcox JJ) upheld the tribunal's decision that the applicant was not entitled to benefits due to her late husband's death from hypernephroma (the aetiology of which was unknown) of a kidney. The husband was a veteran who had served from 1939 to 1945. His hypernephroma became manifest in 1979. Before the tribunal, one medical witness, a forensic pathologist, identified a hypothesis based on a causal connection between, on the one hand, the veteran's consumption of quinine, his stress and lifestyle change, and his diet during war service, and, on the other hand, his development of hypernephroma many years later in life.

12 The other medical witness, an oncologist, disputed the hypothesis, as extensive studies established smoking as the only environmental factor formally related to renal failure and a reverse geographical relationship between the incidence of malaria and renal cancer. In the oncologist's opinion, existing knowledge identified no environmental factor present during the veteran's war service which would predispose him subsequently to develop renal cancer.

13 The tribunal found that the forensic pathologist's hypothesis was not, without some quantification component, reasonable. When any of the four hypotheses of the pathologist was tested against that of the oncologist, whose qualifications in the field were substantially superior, it did not reach the point of becoming "reasonable" in terms of s 120(3).

14 The Full Court found no error of law in the tribunal's construction and application of s 120 or in relation to the pathologist's reasoning.

15 It rejected the view that under s 120(1), a claim must succeed if there were a real possibility of a causal connection and no proof beyond reasonable doubt of facts negating it. Such a construction was, the Full Court said, inconsistent with the history of the legislation (which was amended in 1985 to reverse, to some extent, the earlier trend towards improving the claimant's position) and with the meaning of the phrase "reasonable hypothesis".

16 The Full Court expressly agreed with the reasoning in *Re Stacey* (unreported, Veterans' Review Board, 26 June 1985) ("*Stacey*"), quoted by the tribunal in *Re Dell and Repatriation Commission* (1986) 9 ALD 596 at 615-616. In *Stacey*, the Board stated:

A hypothesis may be conveniently defined as: "proposition made as basis for reasoning, without assumption of its truth; supposition made as starting point for further investigation from known facts; groundless assumption": *The Concise Oxford Dictionary*.

...

The addition of the word "reasonable" would however seem to imply that what is required is more than a mere hypothesis. In the opinion of the Board, to be reasonable, a hypothesis must possess some degree of acceptability or credibility — it must not be obviously fanciful, impossible, incredible or not tenable or too remote or too tenuous. For a reasonable hypothesis to be 'raised' by material before the Board, we think it must find some support in that material — that is, the material must point to, and not merely leave open, a hypothesis as a reasonable hypothesis. At the same time, however, a hypothesis may be reasonable without having been proved (either on the balance of probability or beyond reasonable doubt) to be correct as a matter of fact. Were it otherwise, it would no longer be a hypothesis but would have been elevated to some higher status. Accordingly a connection asserted by a hypothesis to exist between death or incapacity and service may still be reasonable even though theoretical, and it may be theoretical in either or both of at least two senses: by postulating a known medical fact but in circumstances not known to have definitely existed in the instant case; or by postulating a medical principle which science is not yet able to definitely prove but is unable to describe as unreasonable.

17 The Full Court concluded at 533:

We agree with this analysis. A reasonable hypothesis requires more than a possibility, not fanciful or unreal, consistent with the known facts. It is an hypothesis pointed to by the facts, even though not proved upon the balance of probabilities.

18 The Full Court stated that it was not necessarily erroneous to reject a hypothesis that factor A caused condition B because there was no evidence as to the quantity or intensity of factor A experienced by the veteran. It considered that depending on the nature of the hypothesis being propounded in a particular case, quantitative evidence may be necessary. Nor did the Full Court consider that the tribunal erroneously, in substance, imposed an onus of proof (at 533).

19 The Full Court also observed that whether there was a reasonable hypothesis connecting the veteran's death to his war service was a conclusion of fact, as to which there was no right of appeal under s 44 of the AAT Act.

20 In *Repatriation Commission v Bey* (1997) 79 FCR 364 ("Bey"), a Full Court of five affirmed the authority of *East*, stating that "[a]ny doubt that attends the status of *East* as a correct exposition of the law relating to s 120(3) should be dispelled" (at 372).

21 In *Bushell v Repatriation Commission* (1992) 175 CLR 408 ("Bushell"), the High Court held that the tribunal erred in finding that the material before it did not raise a reasonable hypothesis connecting a veteran's hypertension with stress from a war-caused anxiety state. The plurality (Mason CJ, Deane and McHugh JJ) recognised (at 412) that, by s 120(5) of the Act, there is no presumption that the injury, disease or death of a veteran was war-caused, but, on the other hand, the claimant bears no onus of proof (s 120(6)).

22 The plurality rejected the Commission's contention that s 120(3) exhaustively defined the content and the application of the concept of reasonable doubt mentioned in s 120(1).

23 It considered that s 120(1) was the "governing" provision and s 120(3) functioned to ensure that a claim under s 120(1) would not be met unless there were some material which raised the relevant causal hypothesis (at 415).

24 The plurality discussed the relevant Explanatory Memorandum and stated (at 414):

The material will raise a reasonable hypothesis within the meaning of s 120(3) if the material points to some fact or facts ("the raised facts") which support the hypothesis and if the hypothesis can be regarded as reasonable if the raised facts are true.

25 The plurality observed that it was relevant, in forming an opinion whether a particular hypothesis was reasonable, that as a matter of common or medical experience, the occurrence of an injury was commonly accompanied by, or associated with, the occurrence of raised facts of the kind which constituted the relevant incidents of the veteran's service. Their Honours acknowledged, however, that a hypothesis might still be reasonable if there were no such accompaniment or association, or if it were uncommon. Nor was it decisive that no connection had been proved between the kind of injury which occurred and circumstances of the kind which

constituted the relevant incidents of the veteran's service, or that the medical or scientific opinion supporting the hypothesis had little support in the medical profession or among scientists (at 414).

26 Their Honours stated that a hypothesis cannot be reasonable if it is contrary to proved scientific facts or to the known phenomena of nature or "obviously fanciful, impossible, incredible or not tenable or too remote or too tenuous", but acknowledged that a hypothesis based on the raised facts would rarely be unreasonable when it was "put forward by a medical practitioner who is eminent in the relevant field of knowledge" (at 414-5). Nor would conflict with other medical opinions be sufficient to reject a hypothesis as unreasonable, as the Commission was not required under s 120(3) to choose between competing hypotheses or to determine whether one medical or scientific opinion was to be preferred to another.

27 While recognising that a hypothesis could still be reasonable although unproved or opposed to the weight of informed opinion, the plurality stated at 415:

This does not mean, however, that in performing its functions under s 120(3) the Commission cannot have regard to the medical or scientific material which is opposed to the material which supports the veteran's claim. Indeed, the Commission is bound to have regard to the opposing material for the purpose of examining the validity of the reasoning which supports the claim that there is a connection between the incapacity or death and the service of a veteran.

28 The plurality further stated at 415-6:

Likewise, it is the duty of the Commission under s 120 to decide the claim on the material before it and, unless there is material which raises a reasonable hypothesis connecting the operational service with the incapacity or death, there is nothing upon which the Commission can find that the incapacity or death was war caused within the meaning of s 120(1). But once the material raises such a hypothesis, the operation of s 120(3) is spent and the case falls to be determined in accordance with s 120(1). That is to say, the Commission must determine that the injury etc was war caused unless it is satisfied beyond reasonable doubt that there is no sufficient ground for making the determination.

The Commission will be satisfied beyond reasonable doubt "that there is no sufficient ground for making [the] determination" if it is satisfied beyond reasonable doubt that it cannot accept the raised facts or so many of them as are necessary to support the hypothesis. Thus, if the Commission is satisfied beyond reasonable doubt that it cannot accept the raised facts because of the unreliability of the material which is claimed to support them or because of the superior reliability of other parts of the material before the Commission or because the raised facts depend on inferences which the Commission is satisfied cannot be drawn, the Commission will be satisfied that there is no sufficient ground for making the determination. But unless the Commission is satisfied beyond reasonable doubt that there is no sufficient ground for the factual foundation of the hypothesis, the claim must succeed...

29 In *Byrnes v Repatriation Commission* (1993) 177 CLR 564 ("Byrnes"), the High Court held that the tribunal erred in rejecting the claim of a veteran who claimed that his cervical and thoracic spondylosis was caused by his war service between 1943 and 1945 when he was injured on three occasions. One witness, an orthopaedic surgeon, asserted that a link between the claimed occurrences and the cervical spondylosis was a reasonable hypothesis. Another orthopaedic surgeon, supported by two government medical officers, nevertheless thought the hypothesis unlikely, because the veteran's injuries, as described, were unlikely to be severe enough to cause the relevant condition.

30 The tribunal rejected the veteran's claim. It concluded that the material did not raise a reasonable hypothesis, because, inter alia, there was no evidence to show that the injury sustained by the veteran was severe.

31 The High Court held that the tribunal had erred in concluding that no reasonable hypothesis was raised because there was no proof of a severe neck injury. Rather, Bushell required only that the material before the Commission raise facts which give rise to the hypothesis and "[w]hen that fact or those facts have been identified, the question for determination is whether the hypothesis is reasonable" (at 569-70). The High Court (at 571) summarised the relationship between subs (1) and (3) of s 120 as follows:

- (1) First, subs (3) of s 120 is applied: do all or some of the facts raised by the material before the Commission give rise to a reasonable hypothesis connecting the veteran's injury with war service? The hypothesis will not be reasonable if it is contrary to known scientific facts or is obviously fanciful or untenable. If the hypothesis is not reasonable, the claim fails. Proof of facts is not in issue at this point. (2) If a reasonable hypothesis is established, subs (1) of s 120 is applied.

32 The High Court also acknowledged that in some cases, the hypothesis may assume the occurrence or existence of a fact. In the case before it, the hypothesis would not be unreasonable merely because it assumed (rather than proved) that the veteran had suffered a severe injury (at 570).

33 The High Court stated that once a reasonable hypothesis was raised, the question was then whether the Commission was satisfied beyond reasonable doubt that the injury was war-caused. It would be so satisfied if the factual foundation of the hypothesis were disproved beyond reasonable doubt, because a fact or facts relied on were not true or a further fact which was inconsistent with it was proved.

34 The High Court recognised that Bushell's statement that if the raised facts raised a reasonable hypothesis it would be decisive unless they were disproved, must be qualified in cases where raised facts on which the veteran relied were not "the whole of the material" bearing on the hypothesis before the decision maker (at 570).

35 The High Court stated (at 570):

In some cases, the hypothesis may assume the occurrence or existence of a "fact". That itself does not make the hypothesis unreasonable. So, in the present case, the appellant's hypothesis is not unreasonable simply because it assumes that the appellant sustained a severe injury when he dived into a swimming pool in Townsville, notwithstanding that the materials before the commission did not reveal the extent of the injury which he then suffered.

36 In *Bey*, the plurality (Northrop, Sundberg, Marshall and Merkel JJ) stated (at 366 to 367):

The method of applying s 120(1) and s 120(3) is now well established:

- (1) One commences with subs (3). The first step is to identify the hypothesis said to establish the causal link between the veteran's eligible war service and the death, injury or disease. Identifying the hypothesis is a question of fact.
- (2) The second step under subs (3) is to determine whether the hypothesis is reasonable. The material will raise a reasonable hypothesis if it points to some fact or facts which support the hypothesis (the "raised facts") and if the hypothesis can be regarded as reasonable assuming the raised facts to be true. In determining whether the hypothesis is reasonable the decision maker must identify the facts said to point to it.
- (3) Whether a hypothesis is reasonable is a question of fact. The decision maker must be satisfied that the hypothesis is reasonable after considering the whole of the material. Proof of facts and onus of proof are not in issue at this point.
- (4) If the decision maker concludes that the material raises a reasonable hypothesis, the third step is reached. Subsection (1) must be applied, and the claim will succeed unless one or more of the facts necessary to support the hypothesis are disproved beyond reasonable doubt, or the truth of another fact in the material, which is inconsistent with the hypothesis, is proved beyond reasonable doubt, thus disproving, beyond reasonable doubt, the hypothesis.

In some cases the hypothesis may assume the occurrence or existence of a "fact". That itself does not make the hypothesis unreasonable: *Byrnes* (at 570) and *Critch v Repatriation Commission* (1996) 43 ALD 574 at 577.

37 In *Repatriation Commission v Webb* (1998) 51 ALD 575 ("*Webb*"), the tribunal assumed as part of the hypothesis that the veteran had a condition which caused his death (although it was not proved) and separately discussed the other part of the hypothesis, which was whether there was a connection between that condition and smoking.

38 The Full Court found that the tribunal had, without giving any reasons, discounted a specialist's evidence that malignancy was the most likely diagnosis, thus failing to take account of a relevant matter.

39 In Webb, the relevant hypothesis consisted of three parts, namely, smoking caused by war-service, smoking causing non-hodgkins lymphoma and death. The first element was uncontroversial and the tribunal held that while the second element was unlikely that did not suffice to render the overall hypothesis unreasonable.

40 The Full Court held that the tribunal's conclusion nevertheless demonstrated that it had allowed the conflicting evidence on the second element to cast doubt on the overall hypothesis and had held it unreasonable.

41 The Full Court stated that the proper approach was to ask, in relation to each sequential part of the hypothesis, whether facts pointed to that part being reasonable, and any doubts concerning it were to be set aside, rather than carried over or accumulated in relation to the reasonableness of another part of the hypothesis or the hypothesis as a whole (at 582).

42 In Whitworth v Repatriation Commission (2003) 78 ALD 126 ("Whitworth"), Ryan J upheld the tribunal's finding that there was no reasonable hypothesis linking the veteran's exposure to benzene on war service and his development of pancytopenia (a cause of his death) 50 years later.

43 Ryan J stated at [6]:

The applicant's case on pancytopenia is that there is a reasonable hypothesis linking the applicant's exposure during war-service to "benzine" (or "benzene"), as found by the tribunal at [81] of its reasons, to the development of pancytopenia 50 years after exposure. Mr de Marchi for the applicant criticised the tribunal for, variously, choosing between the expert evidence of Dr Collins and Dr Fox (which in terms, it did not, at [84]); rejecting the hypothesis as unreasonable simply because it was advanced by Dr Collins and not Dr Fox; for scrutinising the reasoning of Dr Collins' hypothesis against the background of Dr Fox's evidence rather than looking for material pointing to that hypothesis; for failing to acknowledge that the chain of reasoning in a reasonable hypothesis may involve suppositions; and for failing to treat Dr Collins' evidence as material raising a reasonable hypothesis.

44 Ryan J referred to Bushell as the starting point for identifying error of law. His Honour stated at [8]:

While an hypothesis may yet be reasonable though scientifically unproven, the High Court's discussion clearly proceeds on the basis that the hypothesis is founded on facts pointed to by the material. That requirement is inescapable. Even in a case where a scientifically unproven hypothesis is put forward by a relevantly qualified witness, the commission and the tribunal must, in such a case, still scrutinise that theory in light of the other available medical evidence and consider "the validity of the reasoning" supporting it. True it is that there need not be, necessarily, material pointing to every step in the process of reasoning by which the hypothesis connects war-service with the development of a disease.

45 His Honour referred to Byrnes and stated at [9]:

However, none of these statements detracts from the principle that an hypothesis cannot rise to the level of being a "reasonable hypothesis" if it does not satisfy the requirement that it be raised by the material. The appropriate test has been set out in *East v Repatriation Commission* (1987) 16 FCR 517 at 532-3 ; 12 ALD 389 at 403; 74 ALR 518 at 533-4, where this court adopted what was said in *Re Dell and Repatriation Commission* (1986) 5 AAR 253 at 254-5...

46 His Honour also referred to the qualification of *Bull v Repatriation Commission* (2001) 188 ALR 756 at [18]:

It is important to understand the following about *East*. The court said that an hypothesis is not reasonable if it is obviously fanciful or impossible or incredible or not tenable or too remote or too tenuous. However, the Full Court did not say that if an hypothesis was not obviously fanciful or not impossible, or not incredible or tenable or not too remote or not too tenuous, it was therefore necessarily reasonable. The material must point to the connecting hypothesis...

(some emphasis added)

THE TRIBUNAL'S REASONS

47 The tribunal, having set out the facts, discussed the applicable legislation and relevant authorities in detail. It recognised that the substantive issues for its determination were as follows (at [56]):

- (a) whether the medical cause of Mr Farley-Smith's death (kind of death) was as stated in his death certificate;
- (b) having regard to the medical scientific evidence before us, whether the material points to a reasonable hypothesis of connection between Mr Farley-Smith's claimed exposure to benzene and his medical cause of death; and
- (c) assuming the material before us raises a reasonable hypothesis, whether exposure to benzene in the circumstances claimed by Mrs Farley-Smith was consistent with the reasonable hypothesis.

48 The tribunal identified the applicant's three hypotheses as follows (at [65]):

As we understood Mrs Farley-Smith's claim, she submitted three hypotheses linking her husband's death with his operational service. They are:

- (a) his death from myelofibrosis (MF) was connected to his exposure to tobacco products containing benzene and to exposure to benzene in the course of using petroleum products to clean machine parts and to wash his hands;
- (b) MF is a disease associated with myeloid dysplastic disorder which was connected to his operational service by exposure to benzene; and

- (c) that her husband's MF was secondary to chronic myeloid leukaemia (CML) which was connected to his operational service by consumption of tobacco products containing benzene.

(emphasis added)

49 The tribunal observed that the question of the nature of the veteran's death was anterior to and distinct from the question of the relationship of the death to the veteran's service and the extent of the entitlements to the benefits under the Act in respect of that death.

50 The tribunal noted that, as recognised in *Collins v Repatriation Commission* (2009) 177 FCR 280, the sections dealing with death and the kind of death asked a causative question, and, as the Full Federal Court observed in *Repatriation Commission v Law* (1980) 31 ALR 140, there may be more than one medical cause for the veteran's incapacity or death, which must be a contributing cause, although not necessarily the sole or dominant cause.

51 The tribunal set out the veteran's medical history leading up to his death.

52 The tribunal noted at [73] that:

There was no dispute about the fact that Mr Farley-Smith had acquired MF. However, the Commission submitted that there was no evidence of any disease, other than primary MF (PMF), which caused or contributed to Mr Farley-Smith's death.

53 The tribunal observed that expert medical evidence (on behalf of the applicant) was obtained from Dr Collins, a pathologist, Associate Professor Parkin, a clinical and laboratory haematologist, (on behalf of the Commission) from Professor Peach, a Professor of Public Health and a molecular biologist, and Professor Richard Fox, the past Professor and Director of Haematology and Oncology at the Royal Melbourne Hospital.

54 The tribunal observed that the Commission had objected to the evidence of Dr Collins and Associate Professor Parkin in relation to reasonableness of the hypothesis connecting the medical cause of the veteran's death with his operational service (but not their opinions about the kind of death).

55 The tribunal discussed each doctor's report (none of which supported the view that the veteran had leukaemia, as opposed to primary myelofibrosis ("PMF")).

56 The tribunal concluded at [90]:

In our opinion, the evidence of the medical cause of Mr Farley-Smith's death clearly excludes CML and myelodysplastic disorder. All of the medical evidence strongly points to PMF and accordingly, on the balance of probabilities, we find that the kind of death met by Mr Farley-Smith was PMF.

57 The tribunal observed that there was no dispute that Mr Farley-Smith had rendered operational service. His records indicated that he had served as a gun layer for approximately 13 months.

58 The tribunal stated at [95] that the applicant submitted that:

...the hypothesis connecting Mr Farley-Smith's death with his eligible war service was his exposure to tobacco products containing benzene, and exposure to benzene by contact with petroleum products he used to clean machine parts, including the Bofors anti-aircraft gun which was operated by 112 LAA.

59 The tribunal referred to s 120(3) of the Act. It stated that its first task was to determine whether the causal hypothesis advanced by the applicant was reasonable, noting, in that context, the distinction between a mere and a reasonable hypothesis.

60 The tribunal considered in detail the authorities on s 120 of the Act, the expert evidence and a large number of case studies and cohort studies on benzene exposure. It dismissed the second and third hypotheses advanced by the applicant on the respective bases that the veteran never acquired either CML or a myeloid dysplastic disorder.

61 In relation to the first hypothesis set out at paragraph 65(a) of its reasons (see para [48] above), the tribunal first held that, as nothing in the scientific literature or the expert evidence indicated a connection between exposure to tobacco products and the development of myelofibrosis, the aspect of the applicant's first hypothesis involving exposure to tobacco products could not be reasonable.

62 The tribunal then dealt with the additional or alternative basis to the applicant's first hypothesis of exposure to benzene using petroleum to clean the Bofors gun and other machinery.

63 The tribunal (at [149]), having dismissed the other hypotheses, stated that the applicant's principal contention was that her husband's exposure to petroleum containing benzene in the course of his operational service in Darwin caused him to contract myelofibrosis. As the medical experts agreed that the cause of myelofibrosis was unknown, they relied entirely on epidemiological evidence, including single case studies, although the former were no longer included in the six levels of classification.

64 The tribunal referred at length to that evidence in establishing a reasonable hypothesis.

65 The tribunal at [151] recognised that the applicant's claim that she had raised a reasonable hypothesis was not to be determined on the balance of probabilities, but rather, it must:

simply determine whether the hypothesis is contrary to proved scientific facts or to the known phenomena of nature; and that it is not obviously fanciful, impossible incredible or not tenable, or too remote or too tenuous. There must be sufficient factual material to point to a reasonable hypothesis connecting Mr Farley-Smith's death with his operational service.

66 The tribunal discussed the use of epidemiological studies in evidence and epidemiological principles.

67 The tribunal stated at [212]:

Whether a reasonable hypothesis exists in this case depends entirely on the medical scientific evidence which was before us. The single case reports between 1938 and 1995 suggesting the possibility a relationship between benzene exposure and the development of primary MF provided an impetus for cohort studies in an attempt to find a causal linkage. In the early cohort studies there were reports of cases of MF which raised the possibility that benzene had played a role. However, in all instances, the concentration of the benzene exposure had been high; the exposure extended over quite long periods of time; and the latency period between cessation of exposure and the development of MF was a maximum of 17 years.

68 The tribunal stated at [213] that "[t]he scientific evidence is that no causal link between benzene exposure and MF has been substantiated".

69 The tribunal noted that Bushell did not preclude regard to material opposed to material which supported a veteran's claim, and observed that, consistently with East, the material must point to, rather than merely leave open, a hypothesis as a reasonable hypothesis.

70 The tribunal observed that Professor Peach considered that studies indicating a link between exposure to benzene and myelofibrosis were unsound, and that a connection between benzene and myelofibrosis was contrary to the findings of various other studies.

71 The tribunal noted Professor Fox's view that claims on a legal website of a demonstrated link between benzene and myelofibrosis were misleading, as they related to isolated case reports; there was no reported case of myelofibrosis with a latency period similar to that claimed in the present case; and individual case reports indicating an "association" between benzene exposure and myelofibrosis did not indicate any "link", unless supported by epidemiological evidence.

72 The tribunal concluded at [238] to [239]:

Professor Peach is not only an expert in the field of the aetiology of MF, but he is also a medical practitioner who can be properly described as eminent in the relevant field of knowledge. Therefore, his opinion must carry substantial weight. According to Professor Peach, there was no material in the scientific literature which points to rather than merely leaves open the causal connection between benzene exposure and MF. In his opinion the scientific studies, particularly the more recent studies dealing with clonal stem cell disorders, disclose a link with the mutation which occurs in the JAK2 gene. That mutation distinguishes polycythaemia vera, essential thrombocythaemia and primary MF from other blood disorders.

Professor Fox, who is also an experienced haematologist with extensive clinical exposure to MF, supports Professor Peach's opinion.

73 The tribunal then discussed the evidence of Associate Professor Parkin, who supported the applicant's hypothesis. It observed that he had no clinical experience in the development of myeloproliferative disease or myelofibrosis and was unfamiliar with the hierarchy applicable to scientific evidence. The tribunal (at [241]) referred to Associate Professor Parkin's testimony about his recent literature search, which had revealed scientific articles on the subject of exposure to benzene and its effects. Five of the articles were case reports and ten were cohort studies (possibly half of which had been referred to by Professor Peach). The tribunal stated (at [241]) that, as questioning revealed, "Associate Professor Parkin only had abstracts of those articles, not the full text. We were not assisted by this evidence."

74 The tribunal noted that when asked whether a certain level of exposure to benzene was necessary in order to establish a connection with the development of myelofibrosis, Associate Professor Parkin acknowledged that he was not an expert in toxicity and accepted that the scientific papers all suggested a threshold level of exposure, at least for chromosomal damage.

75 The tribunal noted that Associate Professor Parkin considered a hypothesis to be merely a testable assertion, so that even if only one paper suggested that benzene might be associated with myelofibrosis, that was all that was necessary to render it reasonable.

76 The tribunal concluded at [244]:

Given the very detailed expert analyses provided by Professor Peach and supported by Professor Fox, we find that the hypothesis relied on by Mrs Farley-Smith, that Mr Farley-Smith's MF was connected to exposure to benzene, is not reasonable. Although Associate Professor Parkin's opinion was that it was not established that there existed a threshold level of exposure to benzene before the onset of toxicity, even he agreed that the scientific literature did not support his opinion. In fact, the scientific studies do not point to any connection between benzene exposure and MF. They do point to a connection between benzene exposure and other myeloproliferative disorders where the concentration of exposure is high; where the exposure is over many years; and where the onset of the disease occurred within about 17 years following cessation of exposure. The facts in evidence before us, even if found to be true, do not establish these three essential elements of connection. The most that can be said is that the scientific studies leave open the possibility of an association between benzene exposure and MF. They do not point to a fact or facts which support a hypothesis which could be regarded as reasonable if the raised facts were true.

77 The tribunal then considered whether if there were (contrary to its finding) a reasonable hypothesis, the facts on which it could operate could be disproved beyond reasonable doubt or an inconsistent fact was proved beyond reasonable doubt to be true. (In that context, the tribunal considered a modified version of the hypothesis asserted by the applicant, which depended on a level of exposure to benzene over time).

78 The tribunal found (at [279]) that on the evidence, the veteran was exposed to benzene in the course of his operational service, but the exposure was not more than "the occasional exposure to fumes in an open environment or the occasional dermal contact with petrol."

79 The tribunal concluded at [280]:

In our opinion, that does not lead to the conclusion that, assuming there is a reasonable hypothesis in this case, we must find Mr Farley-Smith's MF was war-caused through contact with benzene in petrol. That is because all of the scientific literature dealing with the effects of benzene exposure on the human body only disclose serious health risks where concentrations of benzene were high; the persons involved were continuously exposed for lengthy periods; and the disease was acquired within a particular latency period following cessation of exposure to benzene.

80 The tribunal relied on the evidence of Professor Peach and Noel Tresider, an industrial chemist and engineer. Mr Tresider indicated that, in accordance with Professor Peach's evidence, a safe occupational exposure standard for benzene was 0.5 parts per million over a working lifetime.

81 The tribunal concluded at [289] that it was satisfied beyond reasonable doubt that the veteran's exposure to benzene during the 13 month period of his operational service did not exceed 0.5 parts per million. The maximum period of 13 months' exposure was also, beyond reasonable doubt, insufficient to cause the development of any benzene related disease.

82 The tribunal also found that the veteran's diagnosis, some 50 years after the cessation of his exposure, was a fact inconsistent with a reasonable hypothesis, as no cohort studies or case reports disclosed a relationship between benzene and the development of blood disease following that latency period.

83 The tribunal concluded at [293]:

Therefore, even if Mrs Farley-Smith had raised a reasonable hypothesis linking her husband's MF to benzene exposure during his operational service, we are satisfied beyond reasonable doubt that there is no sufficient ground for making a determination that his MF and subsequent death was war-caused because the facts in Mr Farley-Smith's case, necessary to support the hypothesis, do not exist. Mr Farley-Smith's level and duration of exposure to benzene was insufficient to satisfy the concentrations required, on current scientific knowledge, to attribute any disease to this exposure.

Grounds of appeal

Ground 4.1

The Tribunal erred in law in that it rejected evidence before it in determining whether or not the material pointed to a hypothesis being raised between the claimed condition and the circumstances of the service by the veteran, namely in substance the relationship between benzene exposure and the medical condition myelofibrosis, and in particular when it:

4.1.1 Rejected the evidence given by Dr Collins on the basis of an assessment of credibility;

4.1.2 Weighed up competing evidence before it;

4.1.3 Treated the evidence of Associate Professor Parkin with caution due to the role he had played in the formulation of the claim; and

4.1.4 Rejected evidence on the basis that an expert was not 'eminent' in the required field, given the qualification and experience of the relevant expert witness;

4.1.5 Rejected the receipt of evidence as to a matter of expert evidence in preference for the application of the Tribunal's own views on the same matter, which it deemed to be of equivalent status to expert evidence;

4.1.6 Failed to follow and or be appropriately guided by *Bushell v Repatriation Commission* (1992) 195 CLR 408, *Repatriation Commission V Byrne and Repatriation Commission v Leighton* [2001] FCA 246 and *East v Repatriation Commission* (1987) 16 FCR 517.

84 Ground 4.1 alleges that the tribunal erred in its rejection of evidence when determining whether or not the material pointed to a hypothesis being raised between the veteran's "claimed condition" myelofibrosis and the circumstances of his service, which was in substance the relationship between benzene exposure and myelofibrosis.

85 Grounds 4.1.1, 4.1.3, 4.1.4 and 4.1.5 allege the erroneous rejection or treatment of evidence on various bases.

86 The other grounds under ground 4.1 (grounds 4.1.2 and 4.1.6) allege failure to follow or to be appropriately guided by specified authorities (ground 4.1.6) and erroneous weighing up of evidence (ground 4.1.2), which although presented as particulars of ground 4.1, are more accurately independent heads of complaint.

87 There were inconsistencies between the above grounds of appeal, the applicant's written submissions, written submissions in reply and oral arguments, aspects of which lacked clarity or were not reflected in the grounds of appeal. Some grounds of appeal were not addressed in detail or at all in the written submissions or oral argument. The applicant also raised apparently new allegations in the course of oral submissions.

88 It is appropriate to deal first with the applicant's fundamental and general allegations of erroneous weighing up of evidence and failure to follow the authorities in grounds 4.1.2 and 4.1.6.

Grounds 4.1.2 and 4.1.6

89 At the hearing of the appeal, Mr De Marchi, for the applicant, principally submitted that while the tribunal accurately set out the relevant principles and authorities, it erroneously applied them by failing to follow the sequential process they required, thereby effectively imposing an impermissible hurdle on the applicant's claim.

90 While conceding that the tribunal's statements of principle were literally correct, Mr De Marchi submitted that in several instances it recited statements from relevant authorities which were unfavourable to claimants, but omitted any reference to countervailing favourable principles, thus suggesting the erroneous imposition of an onus on the applicant. That allegation was not a ground of appeal. In any event, neither the relevant observations, whether literally or as a matter of substance, nor the approach of the tribunal evident from its reasons as a whole, suggested that it endorsed or imposed an onus on the applicant or failed to recognise principles favourable to claimants.

91 The applicant's fundamental complaint under ground 4.1 was the tribunal's alleged misapplication or distortion of the analytical process required by s 120, as construed in Bushell, where the High Court required the tribunal first to determine whether all the material raised a reasonable hypothesis connecting the veteran's death with a particular incident, and only then (if there were such a hypothesis) to determine whether the factual foundation of the hypothesis was disproved beyond reasonable doubt.

92 Mr De Marchi, as I understood him, submitted that in the first inquiry (whether the material raised a reasonable hypothesis) of the two stage process required by Bushell, any assessment of the credibility or expertise of witnesses, preference of the evidence of one witness over that of another, critical scrutiny or fact finding on any matter was precluded. Such evaluation was permitted only at the second stage inquiry as to whether the factual foundation was disproved. Mr De Marchi submitted that in this case, contrary to the alleged prohibition, the tribunal engaged in fact finding and credit assessment at the stage of the "hypothesis". It compounded that error by raising unfounded doubts about the reasonableness of the hypothesis at every stage and, contrary to Webb, carried over and applied the doubts to other parts of the hypothesis, and to the entirety thereof.

93 The hypothesis which remained after the tribunal found that primary myelofibrosis caused the veteran's death was that the veteran's death was connected with his war service by the exposure to benzene by contact with petroleum products he used to clean machinery and guns.

94 While Mr De Marchi, in oral submissions, alleged that the tribunal erred in failing to deal with the tobacco related aspect of the above hypothesis, that was not a ground of appeal or dealt with written submissions. Nor was it borne out by a reading of the reasons, which at [210] expressly dealt with the issue.

95 Mr De Marchi submitted that the tribunal was required first to satisfy itself that there was "a reasonable hypothesis of that exposure" but "did not examine in sequence that first connection", and although it ultimately found that the veteran was exposed to benzene, the tribunal "bundled up" all the material together.

96 As is clear from the discussion of its reasons above, the tribunal, at the stage of determining whether the material before it pointed to a reasonable hypothesis, made findings on the expertise, or lack thereof, or partiality of witnesses offering opinion evidence on the causal connection aspect of the hypothesis and treated that evidence accordingly, by, for example, dismissing it, approaching it with caution or attributing it more or less weight. In my opinion, the tribunal did not thereby err in its fundamental application of the principles established by relevant authorities.

97 In *Bushell*, the plurality made clear that a hypothesis may be reasonable even if unproved, in the absence of any or any common association between the injury and the incidents of the veteran's service, and even if it has little support among scientists or the medical profession or is the subject of conflicting medical opinions.

98 The plurality made clear that s 120(3) did not require the tribunal to choose between competing hypotheses or to determine whether one medical or scientific opinion is to be preferred to another. Similarly, in *Byrnes*, the High Court indicated that in some cases, at the stage of determining whether the material raised facts which pointed to a reasonable hypothesis, the raised facts themselves may be assumed.

99 Pursuant to those authorities, the determination under s 120(3) whether the material raises a reasonable hypothesis precedes the determination under s 120(1) of whether the injury or disease was war-caused because the factual foundation of the hypothesis was or was not disproved beyond reasonable doubt. The authorities do not, however, as the applicant appeared to contend, impose an absolute prohibition on critical assessment and fact finding on any matter in the context of that inquiry. To the contrary (while the raised facts may be assumed at that stage), the tribunal must critically scrutinise the material before it, including contrary medical and other evidence, which necessarily requires assessment of the validity of the reasoning, and the evaluation and weighing of opinion and medical and scientific evidence to determine whether a reasonable hypothesis, which is not too tenuous, remote or obviously fanciful, is raised. As the Full Court stated in *Webb* (at 581):

[a]ny examination of the material before the tribunal necessarily involves having regard to conflicting medical opinions and, as pointed out in *Bushell's* case, this is a proper exercise to be undertaken by the tribunal in the performance of its task. This must involve some degree of evaluating or weighing medical opinions in the light of all the material presented to the tribunal.

100 In the present case, the tribunal accurately recited the principles governing its task, recognising that it must first determine, under s 120(3) of the Act, whether the causal hypothesis advanced by the applicant was reasonable, and that it was "only then that we should embark on a fact finding exercise" under s 120(1) as to whether there was no sufficient ground for making the determination.

101 The tribunal recognised that the question whether a reasonable hypothesis was raised must be determined on a consideration of the whole of the material before it. The tribunal expressly acknowledged the many limitations on rejecting a hypothesis as unreasonable by the authorities, including at [106], that a reasonable hypothesis did not have to represent the preferred view, and, as recognised in *Bushell*, a hypothesis advanced by a medical practitioner eminent in the field would rarely be unreasonable.

102 The tribunal recognised that although when assessing whether a hypothesis were reasonable, the facts could, in some cases, be assumed, there was an exception for the fact of the connection itself, to which the hypothesis was addressed. Thus, in this case, the tribunal could not assume that exposure to benzene during military service resulted in the veteran's myelofibrosis.

103 In my opinion, the tribunal not only correctly stated the relevant principles but correctly applied them. It first dealt with the question whether there was a reasonable hypothesis, without requiring proof of the raised facts or engaging in finding them. The tribunal understood that it was not required to, and did not choose between competing hypothesis and scientific opinions, as distinct from determining whether a particular theory had a rational foundation.

104 Consistently with *Bushell*, the tribunal had regard both to the material opposing and supporting the applicant's claim, including opinion, scientific and medical evidence. As discussed in detail below, the tribunal, when assessing whether the material raised a hypothesis that was reasonable, accorded more weight to the opinion of an expert eminent in the field identified as relevant to the hypothesis (Professor Peach) than it did to that of an expert who was not eminent (Associate Professor Parkin), whose evidence it accepted but approached with caution, as he had strayed into advocacy. It did not thereby choose between competing hypotheses or prefer a particular scientific opinion over another in the sense referred to in *Bushell*. It also dismissed the evidence of a witness (Dr Collins) in relation to the causal connection, as it found that he lacked expertise in the relevant area, but as discussed below, did not thereby fail to consider the material before it.

105 While the applicant in oral submissions contended that the tribunal in the present case fell into the error identified in *Webb*, it remained unclear how doubts in relation to a part of the hypothesis were alleged to be carried over or accumulated in relation to another part. The tribunal considered first the part of the hypothesis concerning a causal connection between myelofibrosis and exposure to benzene, assuming for the purpose that (as it subsequently found) the veteran was exposed to benzene during war service and that, as was not disputed, myelofibrosis was a cause of death.

106 In my opinion, the tribunal did not carry over doubts about some parts of the hypothesis to other parts or to the hypothesis as a whole.

Ground 4.1.1

107 The applicant's characterisation of the tribunal's allegedly erroneously treatment of Dr Collins' evidence was not wholly consistent.

108 Ground 4.1.1 of the supplementary notice of appeal alleged that the tribunal rejected the evidence given by Dr Collins on the basis of an assessment of his credibility.

109 That allegation mischaracterised the tribunal's treatment of Dr Collins' evidence. First, the tribunal did not reject the entirety of Dr Collins' evidence. Rather, it accepted some aspects, and although it rejected other aspects, did not do so on the basis of an assessment of his credibility.

110 The tribunal noted that counsel for the Commission objected to the admission of Dr Collins' expert evidence because he claimed no expertise in haematology, oncology or epidemiology and was thus not an expert in the relevant field. Counsel for the Commission was also critical of Dr Collins' impartiality and credibility.

111 The tribunal accepted Dr Collins' evidence on the cause of death. It stated at [121]:

We have no difficulty with Dr Collins giving expert evidence in relation to cause of death or diagnosis of conditions...

112 However, the tribunal dismissed Dr Collins' evidence on whether there was a reasonable hypothesis based on a causal connection between exposure to benzene and the development of myelofibrosis. The tribunal identified the fields relevant to the applicant's hypothesis as the cause of blood disorders in haematology, oncology and epidemiology, and the relevant experts as specialists in those fields. The tribunal stated at [121] and [122]:

... However, with respect to Dr Collins, there is nothing in his training or experience which points to him being an expert or a person eminent in the field of the aetiology of MF or any of the myeloid diseases.

There was also no evidence before us that Dr Collins had any expertise in epidemiology. Epidemiologists make judgments about whether a statistical association represents a cause and effect relationship. Their focus is on general causation... Accordingly, we find that Dr Collins is not an expert in the aetiology of blood diseases; nor is he a person eminent in the relevant field. We do not therefore propose to address his evidence about whether there is a reasonable hypothesis advanced by [the applicant] for the purposes of s 120(3) of the VE Act.

113 The applicant advanced a different allegation in written submissions, asserting that "the Tribunal erroneously declined to give any weight to expert evidence given by Dr Collins on the basis that he was not an expert in the causes of diseases such as myelofibrosis". Before me, Mr De Marchi, for the applicant, amplified that allegation.

114 While not disputing the tribunal's finding that Dr Collins lacked expertise in the fields relevant to the hypothesis of aetiology of blood diseases, oncology or epidemiology, Mr De Marchi submitted that the tribunal was nevertheless required to address his evidence on a reasonable hypothesis based on a connection between exposure to benzene and the development of myelofibrosis. Mr De Marchi reiterated, in that context, his overriding contention that the tribunal was not entitled to find as a fact that Dr Collins lacked expertise or eminence in the relevant field at the "hypothesis stage" of its determinations, and erred in failing to address his evidence on the hypothesis on that basis. Rather, the tribunal should have examined Dr Collins' evidence on the connection and noted his support at the hypothesis stage. It was entitled to examine Dr Collins' qualifications only at the subsequent stage of determining whether facts necessary to support the reasonable hypothesis were disproved, or an inconsistent fact was proved, beyond reasonable doubt. Instead, the tribunal impermissibly made findings of fact and credit beforehand.

115 In my opinion, the tribunal did not err as alleged. The tribunal was, in my view, entitled to dismiss or accord no weight to Dr Collins' opinion evidence on a causal connection between benzene exposure and the development of myelofibrosis, on the basis of its finding that he was not an expert in any discipline relevant to that question. Having found that Dr Collins lacked expertise, the tribunal necessarily found that he lacked eminence in the relevant field. In *Whitworth*, Ryan J recognised that the mere opinion of an eminent expert that there is a reasonable hypothesis may arguably itself be material pointing to a reasonable hypothesis (at 139), and in *Bey*, Nicholson J stated that the eminence of a medical witness in the relevant field might render his opinion as to possible causation of a disease by the nature of service, even if unsupported by other evidence, sufficient to raise a reasonable hypothesis. Having found that Dr Collins had neither the relevant expertise nor eminence, the tribunal did not consider that his opinion constituted material pointing to a reasonable hypothesis. The obligation to consider the whole of the material prior to fact finding relevant to the s 120(1) inquiry did not prohibit the tribunal from reviewing the evidence of medical witnesses, making findings as to their expertise or eminence and dismissing or attributing no weight to opinion evidence which was not based on any relevant expertise. Nor did it require the tribunal to address such evidence in its reasons.

Grounds 4.1.3 and 4.1.4

116 The applicant alleged that the tribunal erred in its treatment of Associate Professor Parkin's evidence because, while it recognised his expertise and stated that it would consider his evidence, it stated that as he had slipped into advocacy, it would treat it with caution.

117 In my opinion, no error is established in the tribunal's approach to the evidence of Associate Professor Parkin. The tribunal observed that Associate Professor Parkin was a haematologist who, despite his limited exposure to myelofibrosis in that capacity, was qualified to offer an opinion about myelofibrosis and its diagnosis (at [126]). It found that Associate Professor Parkin was expert in matters dealing with blood disorders, although "not a medical practitioner eminent in the relevant field" (at [127]).

118 The tribunal also considered the communications passing between Associate Professor Parkin and the applicant. It concluded that although he had crossed the line into advocacy, as he had relevant expertise, it would rely on his opinions, while treating them with caution. As the tribunal found that Associate Professor Parkin was not eminent in any relevant field, it did not consider his opinion in support of a hypothesis based on a mere possibility of a causal connection and unsupported by evidence, as, in itself, material which raised a reasonable hypothesis.

119 Before me, Mr De Marchi conceded that the tribunal dealt with the contents of those reports in detail but, in oral submissions, alleged that the tribunal ignored Associate Professor Parkin's search of the medical evidence and findings that there were additional cases that supported his hypothesis.

120 That allegation was not a ground of appeal or addressed in written submissions. In any event, it was not made out.

121 The tribunal (at [138] to [140]) referred to a document published on the Internet on which Associate Professor Parkin relied. It also took note of the commentary, which in the tribunal's view relied on the opinion of non-experts about the content and significance of the studies to which he referred.

122 The tribunal noted that Associate Professor Parkin also quoted from a medical textbook which did not refer to myelofibrosis per se, and that another text to which he referred was a superseded edition. Despite those observations, the tribunal considered Associate Professor Parkin's opinion, and the scientific articles on which he relied. It stated (at [167]) that it had "read these scientific articles" but made detailed written consideration of only "the most salient articles and various experts' comments on their contents". The tribunal then analysed seven case studies, six cohort studies and four articles or studies on advances in cytogenetics.

Ground 4.1.5

123 The applicant, in written submissions, stated:

Furthermore, in one passage of the transcript of the hearing, the Tribunal indicated that it would apply its 'knowledge' to the matter before it, suggesting that the Tribunal would make an assessment of the facts based on its own personal knowledge of scientific facts, rather than consider the material before it. This exhibited an error in approach by the Tribunal and provides a basis on which it should be concluded that the Tribunals' [sic] conclusions are unsafe and unacceptable.

124 The above was a reference to Senior Member Fice's statement that "...we have a Tribunal that is constituted by a medical practitioner as well as a lay person... and the very purpose of having a person with expertise in the medical field is for them to apply their knowledge."

125 Before me, Mr De Marchi submitted that the tribunal, in particular Ms Shanahan, a thoracic surgeon, "substituted its own view of the evidence rather than accepting what the material given to the tribunal presented and making a reasonable decision on that".

126 Mr De Marchi further stated that "in this case... the tribunal had previously dealt with... a similar case where she was in the minority and wrote a dissenting judgment... on the connection between myelofibrosis and exposure to benzene." On that basis, ground 4.1.5 appeared to be a restatement of the complaint in ground 4.3, which is dealt with below.

127 To the extent that ground 4.1.5 is an independent complaint directed at Senior Member Fice's observation, it is not made out. The statement was made on 8 April 2010, in an exchange between the tribunal and Mr De Marchi in relation to his application that the tribunal disqualify itself for bias, in which Mr De Marchi complained of the tribunal's previous rulings, including its refusal to accept a paper prepared by the applicant because it was a "lay summary". Mr De Marchi contended that as a member of the tribunal was a lay person, the paper would have been useful. It was in that context that Senior Member Fice replied that the tribunal also included a medical practitioner expert in the field who could apply their knowledge.

128 The observation, in the context of the relevant exchange, in no way indicated that the tribunal intended to prefer, act on or apply its own knowledge in determining the matter before it. An examination of the tribunal's reasons confirms that it conscientiously and carefully assessed, evaluated and proceeded on the basis of, the material before it.

129 In my opinion, the complaints under ground 4.1 are not made out.

Grounds 4.2 and 4.4

4.2 The Tribunal erred in law in that it determined that it could not assume a connection to service, in the circumstances, because it had made an assumption in relation to the existence or occurrence of a fact upholding the hypothesis.

4.4 The Tribunal erred in law in that without any evidentiary basis for so concluding and/or holding it determined that it could not assume a connection to service, in the circumstances, because it had made an assumption in relation to the existence or occurrence of a fact upholding the hypothesis.

130 Ground 4.4 is a repetition, with an immaterial variation, of ground 4.2.

131 The above grounds were not the subject of clear written or oral submissions and their meaning remained elusive. In so far as the applicant complained of the tribunal's failure to assume, at the hypothesis stage, the postulated causal connection between exposure to benzene and the subsequent development of myelofibrosis, in my opinion that approach did not constitute error. The tribunal, in [110] of its reasons, correctly applied Nicholson J's statement in *Repatriation Commission v Dunn* (2006) 94 ALD 97 at [46] that "[i]f there is an assumed fact, it cannot be the fact to which the hypothesis must be addressed; that is, the fact of connection".

132 In my opinion, grounds 4.2 and 4.4 were not made out.

Whether grounds 4.1 and 4.2 moot

133 The respondent submitted that the grounds of appeal alleging that the tribunal failed correctly to apply s 120 of the Act, by making impermissible findings of fact in determining whether the material pointed to a reasonable hypothesis, and by failing to assume "a fact of connection", were moot, because the tribunal proceeded to conclude that the facts necessary to support the applicant's hypothesis did not exist.

134 Given my conclusions above, it is unnecessary to determine that question.

135 Nevertheless, the tribunal found that the facts necessary to support a modified version of the applicant's hypothesis based on a minimum level of exposure to benzene did not exist.

136 I was not persuaded that those factual findings rendered moot the grounds of appeal relating to the tribunal's treatment of the hypothesis advanced by the applicant, which did not depend on any minimum level of exposure to benzene.

Ground 4.3

The Tribunal Member who is a qualified medical practitioner should have decided it was property [sic] to disqualify herself from hearing the case on the basis that she was a qualified medical practitioner and had previously determined (in dissent) that the connection between the hypothesis posed in this case was too remote and tenuous.

4.1.1 The Tribunal Member had prejudged the case;

4.1.2 The Tribunal Member did not bring an open mind to the case before her;

4.1.3 The case before the Tribunal was substantially similar to the case she had earlier determined (both in the hypothesis claimed and the experts presented to it);

4.1.4 An independent observer made aware of these facts would have determined that the applicant could not succeed in her application before a Tribunal so constituted.

137 The applicant alleged that Member Shanahan's dissenting judgment in an earlier case, *Leighton v Repatriation Commission* [2000] AATA 144 ("*Leighton*"), would appear to a fair-minded lay observer to give rise to a reasonable apprehension that the member might not bring an impartial mind to the resolution of the question whether there were a reasonable hypothesis, and might not be open to persuasion. The applicant contended that accordingly, Member Shanahan should have disqualified herself.

138 The applicant relied, in that context, principally on the judgment of the majority (Heydon, Kiefel and Bell JJ) of the High Court in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 ("*British American Tobacco*"). The majority held that a judge's finding, in previous unrelated proceedings, that a party (BATAS) had adopted and concealed a fraudulent business policy of destroying documents to suppress evidence in anticipated litigation, would

give rise to a reasonable apprehension of prejudgment in new proceedings before the same judge, where the same allegation was made against BATAS. The judge (who had already conducted some directions hearings in the new proceedings) refused to disqualify himself. In the earlier proceedings, the judge made the relevant finding on unchallenged evidence in an interlocutory application, acknowledging that it remained a "live issue for the trial", as BATAS denied the allegation and may have had good reason for failing to lead rebutting evidence at that stage.

139 The Court of Appeal, by a majority, upheld the judge's refusal to disqualify himself. Allsop P (dissenting), however, held that given the gravity of the judge's unqualified finding of dishonesty and fraud, a fair-minded lay observer might reasonably doubt that he could eradicate its effect when endeavouring to deal fairly and impartially with the same issue in a new proceeding.

140 The High Court majority endorsed Allsop P's analysis. Their Honours observed that judges were equipped to decide factual contests solely on the basis of the evidence and routine rulings on procedural matters or expressions of tentative opinions were unlikely to lead to disqualification. They nevertheless concluded that a reasonable observer might possibly apprehend that the judge might not alter his conclusion in the earlier proceedings, even on the basis of different evidence.

141 The majority stated (at [145]):

Whenever a judge is asked to try an issue which he or she has previously determined, whether in the same proceedings or in different proceedings, and whether between the same parties or different parties, the judge will be aware that different evidence may be led at the later trial. Judge Curtis's express acknowledgment of that circumstance does not remove the impression created by reading the judgment that the clear views there stated might influence his determination of the same issue in the Laurie proceedings. Allsop P's conclusion was correct. In addition to the possibility of the evidentiary position changing, a reasonable observer would note that the trial judge's finding of fraud was otherwise expressed without qualification or doubt, that it was based on actual persuasion of the correctness of that conclusion, that while the judge did not use violent language, he did express himself in terms indicating extreme scepticism about BATAS's denials and strong doubt about the possibility of different materials explaining the difficulties experienced by the judge, and that the nature of the fraud about which the judge had been persuaded was extremely serious. In the circumstances of this unusual case, a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial — that is, bring an impartial mind to the issues relating to the fraud finding.

142 In *British American Tobacco*, although the new proceedings were commenced in 2006, BATAS did not bring the recusal application until March 2009, by which time the judge had conducted a number of directions hearings and heard evidence from a party. The High Court majority did not consider that the delay (in circumstances which included intervening grants of probate, amended pleadings, change of solicitors and an unsuccessful cross-vesting application) amounted to waiver (which was not, in any event, pleaded below).

143 *Leighton* was decided in 2000 by the Administrative Appeals Tribunal. The majority (Senior Member Dwyer and Mr McLean) found that the applicant raised a reasonable hypothesis that the veteran was exposed to inhalation of benzene during his war service, which was a causal factor in the development of myelofibrosis.

144 Member Shanahan, who dissented, stated at [4] and [11] to [13]:

The evidence before the Tribunal has been presented and considered in detail in the majority decision. I will confine my consideration of the evidence to those areas that have led me to conclude that the hypothesis raised is not reasonable on the grounds that the "raised facts" which are argued to support the hypothesis are too remote and too tenuous. There is no evidence to suggest the late veteran's exposure to benzene on board an ambulance launch in Papua New Guinea was any higher than the exposure to which the general population of this city is exposed in the streets of Melbourne.

...

In his initial report of 15 September 1997 Dr Parkin had used the terminology "substantial exposure to petroleum or benzene" as being a possible causative factor in the development of myelofibrosis. In oral evidence he stated that whilst he was not an epidemiologist, he could not state that there existed a lower limit of safe exposure to benzene. When asked by Mr Douglass for the respondent as to whether there are any studies that compared the exposure of an urban population to benzene and the incidence of acute myeloid leukaemia Dr Parkin answered that he "could not answer that and it might be a difficult study to do" (trans. p50 line 24). Dr Parkin agreed that the studies relating to myelofibrosis were all in groups of workers industrially exposed to benzene. He agreed there were no studies examining dose response relationship between benzene and myelofibrosis at non-occupational levels of exposure. Dr Parkin was unable to comment on the levels of benzene exposure in various occupational and urban living environments and stated that he was not very knowledgeable in that area. Dr Parkin agreed that the benzene exposure from a cigarette would be less than that associated with pollution in an urban area. He was of the opinion that exposure to benzene would be additive or incremental. However he stated this in relation to cases of acute leukaemia not myelofibrosis.

Professors Fox and Peach who gave evidence for the respondent summarised the most current scientific literature on benzene exposure and the development of myelofibrosis. They found no supportive evidence of a causal link. They agreed that benzene exposure was linked causally with the development of acute myeloid leukaemia. Professor Fox was of the opinion that on the facts before the Tribunal the late veteran's exposure to benzene during his service as an ambulance

officer in 1945 for a period of 10 months would not have been greater than ordinary urban pollution levels.

Given the design of the ambulance launch, in particular the exhaust disposal, the constant weather patterns experienced on a day-to-day basis on the journeys between Toraquina and Motrapina Point, the use of low octane petroleum required by the engine dimensions of the launch and that all refuelling operations were carried out by the Captain of the vessel, Mr Max Schey, I find it highly probable that the levels of benzene exposure to which the veteran, Dr Peter Leighton, may have been subject, would have been of the order of or less than benzene levels in urban pollution. Dr Parkin, in evidence, stated that at the Austin Hospital he would see one new case of myelofibrosis per annum compared to 30 or 40 new cases of acute myeloid leukaemia. This does not indicate that urban pollution benzene levels are a factor in the development of myelofibrosis. None of the scientific reports have linked urban exposure to the development of myelofibrosis. For this reason I find the hypothesis proposed unreasonable on the grounds that it is too remote and too tenuous.

145 Despite similarities between Leighton and the present case, Member Shanahan's finding in Leighton was not on the same issue that the tribunal was required to determine in the present case. As Member Shanahan stated at the outset of her dissenting reasons in Leighton, she concluded that there was no reasonable hypothesis in that case because "the raised facts" argued to support it were too remote and too tenuous. Her consideration was, as she expressly stated, confined accordingly. Having discussed relevant evidence, the Member concluded that given the design of the ambulance launch (particularly its exhaust disposal) used during by the veteran's service, the prevailing weather patterns, the low octane petrol and the fact that refuelling was carried out by another person, it was highly probable that the levels of the benzene exposure were only equivalent to, or less than, urban pollution and "[n]one of the scientific reports have linked urban exposure to the development of myelofibrosis".

146 Senior counsel for the applicant conceded that Member Shanahan's findings were confined to the facts raised in Leighton itself, but submitted that the tone of her observations (particularly in paragraph [11] of the reasons) might cause a fair-minded person to apprehend that she was not open to persuasion that benzene exposure was a causative factor in the development of myelofibrosis, and indeed, that she was satisfied that there was no causal link. I reject that submission. In my opinion, the Member's observations in paragraph [11] merely summarised the evidence Dr Parkin gave in Leighton, including his written opinion that substantial exposure to benzene was a possible causative factor in the development of myelofibrosis, his oral testimony that he was not an epidemiologist and could not state that there was a lower limit of safe exposure to benzene, his acknowledgement that there were no studies on non-occupational levels of exposure to benzene and his inability to comment on the levels of benzene exposure in various occupational and urban living environments.

147 In my view, nothing in those observations might cause a reasonable observer to apprehend that Member Shanahan might have absolutely or immutably rejected the possibility that benzene might be a causative factor in the development of myelofibrosis, or otherwise held views on that

question which might preclude her from bringing an impartial and unprejudiced mind to whether the applicant's hypothesis in the present case were reasonable. To the contrary, on a fair reading, the Member's observations in Leighton were consistent with openness to the possibility that benzene exposure at certain levels might be established, on different or further evidence, to be a causative factor in the development of myelofibrosis, although she noted that Professors Peach and Fox (who had summarised "the most current scientific literature" in Leighton) had found no supportive evidence of a causal link. The Member's observations were based on the evidence current at the date of the decision in Leighton, and did not evince scepticism that different materials might lead to a different conclusion.

148 In summary, in my view, a reasonable observer would note that despite the overlap between the broad subject matter of Leighton and this case a decade later, the Member's finding in Leighton was on a specific issue, different from the issues for determination in this case. The reasonable observer would note that in Leighton, Member Shanahan, in any event, merely discussed the current scientific evidence before the tribunal on benzene exposure as a causative factor in the development of myelofibrosis or opinions thereon, and did not express any unqualified conviction on the question.

149 Further, the observer would recognise the character of the scientific question relevant to both Leighton and this case (whether benzene exposure at any level or at all is a causative factor in myelofibrosis) as very different from the serious fraud at issue in British American Tobacco, described by the majority as an "unusual case".

150 If, contrary to the above, Member Shanahan's decision in Leighton were a valid basis for a reasonable apprehension of prejudgment, in my opinion, the applicant waived any entitlement to object. The applicant's legal representative, Mr De Marchi, while aware of Leighton and Member Shanahan's dissenting judgment, in marked contrast to the objector in British American Tobacco, failed either before or during the hearing to apply to the member to disqualify herself. To the contrary, on the sixth day of the hearing, Mr De Marchi sought to rely on Leighton in the course of argument without objecting to Member Shanahan on that basis.

151 Contrary to the applicant's submission, the exchange between Mr De Marchi and Member Shanahan on 9 April did not constitute an application that the member disqualify herself on the basis of her involvement in Leighton, although Mr De Marchi, both prior to and after the exchange on the previous day, applied for the tribunal to disqualify itself on other grounds.

152 Nor, contrary to the applicant's submission, could Member Shanahan's response that it "did not surprise" her, when being informed that she might have been a member of the tribunal (which she had apparently since forgotten), and "might have been a dissenter to that tribunal's judgment granting a pension", indicate to a reasonable observer any admission of prejudgment. No firm significance could reasonably be attributed to the member's generalised, undeveloped and fleeting remark.

153 In my opinion, ground 4.3 is not made out.

Ground 4.5

The Tribunal erred in law in that the Tribunal refused the Applicant a right of reply contrary to the Applicant's right on a proper construction of s 33 of the Administrative Appeals Tribunal Act 1975 to have the Tribunal afford procedural fairness to the Applicant and should have allowed her representative an opportunity to reply to the Respondent's submission.

154 In written submissions, the applicant asserted that the tribunal prejudiced the applicant by a denial of procedural fairness when, contrary to its ordinary practice, it refused her a right of reply on the tenth and final day of the hearing.

155 The applicant relied on the following exchange on 14 April 2010 between Mr De Marchi, the solicitor for the applicant, and the tribunal:

MR DE MARCHI: Yes. And do I understand, sir, that the tribunal will give me an opportunity of replying to my friend's submission as is normal?

MR FICE: Well, no. We just want to hear your submissions. Go ahead. You've got one hour.

MR DE MARCHI: Well, I know I had an hour, so if you don't mind, sir, I will like to inquire as to why the normal procedure of allowing an applicant to respond to the respondent's submission is not being allowed in this case?

MR FICE: Because we've had extensive submissions already. In the course of the hearing we've had extensive submissions. Just go ahead, Mr De Marchi. I don't want you to eat into your hour. You've got an hour to put exactly what it is you want to put.

MR DE MARCHI: Well, I wish to put, first of all, sir, an objection to that ruling to be recorded. Secondly, sir, given that the ruling on the part of the tribunal, I would again ask the tribunal to disqualify itself on the basis that an independent observer – a lay observer sitting at these proceedings would determine that there was ostensible bias on the part of the tribunal in not allowing an applicant to have an opportunity of responding to the submission of the respondent, as is the normal practice in this tribunal, which leave the applicant at a disadvantage of not being able to reply to any of the decisions that are raised, or any of the submissions made by the respondent in relation to questions of law that might arise. In other words, it closes off – I don't know what my friend is going to say as to what the tribunal ought to regard the law as being. So – and again I quote the case of Ebner for that opposition.

MR FICE: No, Mr De Marchi, we will not disqualify ourselves.

156 At the conclusion of the respondent's closing submissions Senior Member Fice offered Mr De Marchi a further opportunity to be heard as follows:

MR FICE: Mr De Marchi, now, having said that we won't have a reply, if there is something that has been raised in the course of that proceeding which has not been addressed – I don't want you to refute, we know you refute what's been said. Is there something that pops out to you and says "That's correct" that you should draw our attention to? I will allow, very briefly ---

MISS SHANAHAN: You mean incorrect in terms of the facts ---

MR FICE: Yes. The facts, yes.

MISS SHANAHAN: --- rather than the law, the interpretation.

MR FICE: The law is something we will work out for ourselves.

157 Mr De Marchi then proceeded to address the tribunal further.

158 Section 33 of the AAT Act relevantly provides:

- (1) In a proceeding before the Tribunal:
 - (a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;
 - (b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and
 - (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

159 Section 39 of the AAT Act provides:

- (1) Subject to sections 35, 36 and 36B, the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents.
- (2) This section does not apply to a proceeding in the Security Appeals Division to which section 39A applies.

160 In my opinion, the applicant was not denied procedural fairness by the refusal of a right to reply.

161 Section 33 of the Act provides that the tribunal's procedure is, subject to the Act, regulations and any other enactment, within its discretion, and the proceedings are to be conducted with as little formality and technicality and as much expedition as a proper consideration of the matters permits. Section 39 expressly requires the tribunal to ensure that every party is given a reasonable opportunity to present its case.

162 The above provisions, individually or together, neither expressly nor implicitly entitle an applicant to reply to a respondent's closing submissions. Nor was there any evidence to support the applicant's assertion that it is the tribunal's ordinary practice to allow such a reply. Whether a reply is required in order to ensure that a party has a reasonable opportunity to present its case will depend on the particular circumstances.

163 In the present case, I am not persuaded that the refusal of a formal right of reply deprived the applicant a reasonable opportunity to present her case or otherwise denied her procedural fairness.

164 As the transcript and the tribunal's reasons for decision indicated, Mr De Marchi was allotted an entire day (the ninth day of hearing) to make his closing submissions on behalf of the applicant and, on his failure to complete them within that time, was allowed an additional hour on the tenth and final day of hearing. Due to a late start on that final day, counsel for the respondent had only three hours in which to make her closing submissions.

165 The applicant did not dispute the tribunal's account of the background to the incident, which was as follows at [20]:

Mr De Marchi raised some final issues on the tenth day of hearing, the last day. This was after the Tribunal had allowed Mr De Marchi the entire ninth day of the hearing, between 10.00am and 4.32pm to make his submissions. Mr De Marchi did not conclude his submissions on that day and we permitted him one further hour on the tenth day of the hearing to conclude his submissions. Because of a necessary late start on the last hearing day, Ms Macdonnell was left with only three hours to make her submissions. Despite that, Mr De Marchi objected to having only one further hour to conclude his submissions. We did not allow that objection. Most of the second-last day was taken up with procedural matters and Mr De Marchi's submissions about disqualification.

166 The tribunal concluded at [20]-[21]:

In our opinion, Mr De Marchi had more than a fair opportunity to make the submissions he wanted to make about the substantive matters in this case.

On that last hearing day, Mr De Marchi opened with another application for the Tribunal to disqualify itself on the basis that it did not intend to allow the applicant an opportunity to respond to the submissions of the respondent, which he said was the normal practice in this Tribunal. This issue had already been covered in some detail on the previous day. Mr De Marchi had made lengthy submissions in the course of the hearing. In addition, this was the second occasion on which this Tribunal had heard this matter. Therefore, we determined that submissions in reply would not further assist the Tribunal. Again, Mr De Marchi submitted that he relied on Ebner's case.

167 Despite its refusal of a formal right of reply, the tribunal ultimately permitted Mr De Marchi to make further submissions after the respondent's counsel had completed her closing submissions.

168 In my opinion, in circumstances where the applicant's representative was allotted considerably greater time than the respondent's counsel for final submissions, exceeded the allocation, was granted an additional hour on the last hearing day (which was shorter than usual) and was permitted an opportunity to respond in any event, the applicant was afforded a reasonable opportunity to present her case, and was accorded procedural fairness. The applicant did not identify any aspect of her case which she was unable adequately to present by reason of

the denial of a formal right of reply and, in my opinion, a failure to accord procedural fairness on that basis is not established.

169 Before me, senior counsel for the applicant also sought, under ground 4.5, to rely on the tribunal's receipt of written submissions handed up by counsel for the respondent during her closing address, while denying the applicant the right to file responsive written submissions. As neither the respondent's document nor (save for an extract of the transcript) evidence of the genesis of the incident was before the court, this complaint was attended by some uncertainty. It appears that after Mr De Marchi had completed his closing submissions on the tenth and final day of the hearing when Ms MacDonnell, counsel for the respondent, offered the tribunal a document to which she spoke in the course of her closing submissions. The extract of transcript in evidence before me revealed that Mr De Marchi immediately objected to receipt of the document, but was requested to reserve his objections until counsel completed her submissions. It also indicated that Mr De Marchi objected to the last two pages of the document which listed authorities. When the respondent's counsel concluded, Mr De Marchi was given a further opportunity to make submissions and, having done so, he sought the opportunity to respond in writing as follows:

MR DE MARCHI: Now, the material that my friend has handed up without an opportunity of being able to address any of these decisions ---

MR FICE: Which material are you referring to, the last couple of sheets?

MR DE MARCHI: The last pages.

MR FICE: The last two sheets. Yes, what do you want to say about that?

MR DE MARCHI: I submit, sir, that we ought to have been given an opportunity of responding to that material in writing.

MISS SHANAHAN: In writing?

MR DE MARCHI: In writing, yes.

MISS SHANAHAN: That's all right. Your written submission on the authorities quoted there, all of which are pretty well established, aren't they? Even I know ---

MR FICE: What is it you want to say about it, just before we jump in and say yes, you can do that?

MR DE MARCHI: I haven't even read it, sir. I don't know what – it appears to be a ground of appeal that is being used in another case by my friend, just simply pulled out of a brief and handed up to the tribunal.

MR FICE: They're authorities dealing with credibility or reliability of evidence. That's what they are.

MR DE MARCHI: That's what they are.

...

MR DE MARCHI: Are these documents to be taken in and have regard to by the tribunal?

MR FICE: These cases – we will look at these cases if it is necessary to deal with the credibility or reliability issue. We don't even know if that's necessary at this stage.

MR DE MARCHI: I seek an opportunity of responding to them, sir.

MR FICE: I don't think it will assist us, Mr De Marchi, so I certainly for one, don't require it. If Miss Shanahan does, I will think otherwise.

MISS SHANAHAN: Well, I've read them already.

MR FICE: ... I don't think it will assist us, Mr De Marchi, thank you, but no.

170 The applicant first raised, in its written submissions in reply, the complaint that the tribunal received the respondent's "voluminous written submission[s]" which included "cases upon which the respondent relied and made submission on the applicable law". Before me, senior counsel for the applicant submitted that the tribunal's refusal of an opportunity to respond to the written submissions evidenced a want of even-handedness and was an integer of a course of cumulative conduct demonstrating bias and want of procedural fairness. Senior counsel principally relied, in that context, on *Leon Holdings Pty Ltd v O'Donnell* (2009) 25 VR 569 ("*Leon Holdings*"), where Habersberger J held that a tribunal's lack of even-handedness in allowing one party to give hearsay evidence while refusing leave to the other party gave rise to apprehended bias and procedural unfairness. Habersberger J did not consider that the tribunal's discretion to allow or disallow hearsay evidence excluded an apprehension of bias where it treated the parties "so differently" with respect to the giving of hearsay evidence (at [72]).

171 The applicant submitted that, as in *Leon Holdings*, the tribunal in this case was not even-handed in accepting a written document from one party, whilst denying the other an opportunity to respond, and denied the applicant an opportunity to be heard in relation to the content of the respondent's written submissions.

172 In my opinion, as counsel for the respondent contended, the applicant's allegation concerning the written submission amounted to a new ground of appeal raised for the first time in the course of oral submissions, on which the applicant was not entitled to rely (see *The Ship "Gem of Safaga" v Euroceanica (UK) Ltd* (2010) 265 ALR 88 at [108]). It was not comprehended by ground 4.5, which on a fair reading referred only to the refusal of the right of reply, as distinct from the refusal of the right to file written submissions responsive to the document handed up by the respondent's counsel. If, contrary to that conclusion, it were comprehended by ground 4.5, in my opinion, it is not made out. The document in question was not in evidence and its nature and contents were uncertain. While extracts of the transcript and the reasons of the tribunal afforded some evidence of the surrounding circumstances, it was incomplete. In circumstances where the applicant adduced no evidence of the contents of the respondent's document and perforce failed to identify any matter which required the opportunity for a written response, no want of even-

handedness or denial of an opportunity to be heard could be established.

173 Senior counsel for the applicant further submitted that the complaint under this ground of appeal should not be assessed in isolation but in the total context of Mr De Marchi's many applications that the tribunal disqualify itself on grounds of "ostensible", "apparent" or "apprehended" bias. Senior counsel submitted that the instances of such bias were cumulative, and irrespective of whether the individual constituents founded an apprehension of bias or want of procedural fairness, the court should take account of the entirety.

174 The cumulative principal matters relied on by the applicant were:

1. apprehension of prejudgment by reason of Member Shanahan's decision in Leighton;
2. denial of the right of reply;
3. the acceptance of a document prepared by the respondent without affording the applicant a corresponding entitlement to forward written submissions in response; and
4. the application for recusal which developed from the reply submission complaint about apprehension of bias due to the refusal to receive a lay summary of Professor Parkin's evidence.

175 Three of those matters are discussed in detail above, while the fourth matter appears to echo matters alleged under ground 4.1.3. In my opinion, no instances of conduct by the tribunal, which either individually or cumulatively could found a reasonable apprehension of bias or a denial of procedural fairness, were established.

176 In my opinion, ground 4.5 is not made out.

Ground 4.6

The Tribunal erred in law on any application in failing to disqualify itself on the ground that the Applicant had failed to articulate every particular event or ruling that occurred in the course of the hearing which might cause an independent lay observer to perceive that the Tribunal may be ostensibly biased.

177 This ground was not separately addressed in any detail in the applicant's written or oral submissions, the former of which stated that:

The Applicant refers to Question 2.6 and its corresponding Ground (Ground 2.6 [sic]). The Court will note that Counsel for the Applicant before the Tribunal made several applications to the Tribunal for it to disqualify itself on the ground of apprehended bias. For reasons expressed above at [13]-[18] of these submissions, the Applicant submits that the Tribunal erred in failing to disqualify itself from hearing this matter.

178 Paragraphs 13 to 18 of the submissions were directed at other distinct complaints, which I have addressed above. There was no evidence that the tribunal refused to disqualify itself on the basis alleged.

179 In my opinion, ground 4.6 is not made out.

Conclusion

180 In my opinion, the appeal should be dismissed.

I certify that the preceding one hundred and eighty (180) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dodds-Streeton.

Associate:

Dated: 13 February 2012

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